UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KEVIN DEEGAN,
Plaintiff,

-v- **5:00-CV-1531**

CITY OF ITHACA, MARIETTE GELDENHUYS, in her official capacity as City Attorney for the City of Ithaca, and RICHARD BASILE, in his official Capacity as Chief of Police of the City of Ithaca,
Defendants.

APPEARANCES:
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Norman A. Mordue, D.J.:

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

In this action, plaintiff challenges the noise ordinance applicable to the Ithaca Commons area in the City of Ithaca ("City"). Plaintiff claims that he has been prevented from preaching his religious beliefs in Ithaca Commons because the City's noise ordinance, as interpreted by defendants, prohibits all speech which can be heard 25 feet away. The single cause of action asserts that defendants' conduct violated plaintiff's federal constitutional rights

to equal protection and freedom of speech, religion, association and assembly. Plaintiff seeks declaratory relief, injunctive relief and compensatory damages.

The Court assumes that the reader is familiar with the history of the action and the contents of the February 28, 2001 Memorandum-Decision and Order denying plaintiff's motion for a preliminary injunction, and the June 18, 2003 Memorandum-Decision and Order denying the parties' motion and cross motion for summary judgment.

Presently before the Court is the "Parties' Joint Stipulation of Facts" ("Stipulation") and the transcript of the sworn testimony of Thomas S. Katra, taken outside the presence of the Court on January 13, 2003. The parties stipulate that the Stipulation and the transcript shall serve as the entire trial record, and they submit the case to the Court for final determination. For the reasons set forth below, the Court dismisses the action.

FACTS

The Court incorporates by reference the Stipulation and the transcript of Katra's testimony. The facts in the stipulation constitute findings by the Court as do the facts (but not the opinions) in Katra's testimony. Based on these two documents, the Court sets forth the following summary of the facts upon which it bases its legal determinations.

Facts drawn from Stipulation

As a tenet of his Christian faith, plaintiff believes it to be his religious duty to preach publicly about Christianity. "Preaching" involves speaking in public locations in a raised voice that can be heard beyond 25 feet. Plaintiff believes that preaching enables him to express his religious views, to attract the attention of his intended audience and to communicate his message to as many people as possible. He further believes that preaching

enables him to associate with others who share similar religious views, to counsel others concerning his faith and otherwise to engage in religious activities.

On October 9, 1999, plaintiff and three companions went to Ithaca Commons and began preaching. Ithaca Commons is a two-block T-shaped area in the City in which the streets have been closed to vehicular traffic and converted into a pedestrian mall. Both streets in Ithaca Commons are approximately 66 feet wide. Ithaca Commons is a public forum.

City Police Officer Gregory Firman, in response to a telephone complaint from an employee of a store in Ithaca Commons, approached plaintiff and his companions and told them that the City noise ordinance prohibited speech that could be heard 25 feet away. He told them that their speech violated the ordinance and directed them to comply with the 25-foot limitation.

Plaintiff asked to see the noise ordinance, and Officer Firman left to obtain a copy. After Officer Firman left, plaintiff began to speak at a lower volume in an attempt to comply with the ordinance. During this time, plaintiff noticed others in the area who could be heard 25 feet away, including people conversing more than 25 feet away and a singing group of about ten women about 200 feet away. No police officer approached anyone other than plaintiff and his companions. There were no complaints about anyone but plaintiff.

When Officer Firman returned after about ten minutes, he noticed that the volume of plaintiff's speech was lower but still in violation of the ordinance. Officer Firman characterized plaintiff as speaking at the "top of his lungs" persistently and continuously. Officer Firman told plaintiff that if he did not reduce his volume to a level that could not be heard at 25 feet, he would face arrest. Plaintiff and this companions left the City.

Plaintiff feels that he cannot communicate effectively if he cannot be heard from a distance of 25 feet and that therefore compliance with the ordinance "would effectively eliminate his speech efforts." As a result of the City's refusal to allow him to speak at a volume that could be heard from 25 feet away, plaintiff did not again attempt to preach in Ithaca Commons for fear of arrest. Plaintiff has never used the alternatives of applying for a permit to use amplified sound, speaking in a lower tone of voice so as not to be heard from the distance of 25 feet, or passing out brochures.

The City is concerned with the comfort, repose, health and safety of everyone in the City. The City, the City Attorney and the City police department interpret, construe, and enforce the City noise ordinances, specifically sections 240-4 and 157-18, to prohibit any noise that can be heard 25 feet away. The prohibition applies to any type of noise, including speech, whether the noise is amplified or unamplified and whether it occurs in Ithaca Commons or elsewhere in the City. The ordinance restricts only volume and does not restrict content of speech.

Ordinance

The parties refer to two sections of the City local law of the City. One reads in part:

> **§157-18. Amplified sound.**
>
> A. Except by special permit ... no person shall operate or cause to be operated on the Ithaca Commons any boom box, tape recorder, radio or other device for electronic sound amplification in a loud, annoying or offensive manner such that noise from the device interferes with conversation or with the comfort, repose, health or safety of others within any building or at a distance of 25 feet or greater.

The other section, pertaining to the City of Ithaca in general, provides:

§ 240-4. Unreasonable noise prohibited.

A. No person shall intentionally cause public inconvenience, annoyance or alarm or recklessly create a risk thereof by making unreasonable noise or by causing unreasonable noise to be made.

B. For the purpose of implementing and enforcing the standard set forth in Subsection A of this section, "unreasonable noise" shall mean any sound created or caused to be created by any person which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of the public or which causes injury to animal life or damages to property or business. Factors to be considered in determining whether unreasonable noise exists in a given situation include but are not limited to any or all of the following:

(1) The intensity of the noise.

(2) Whether the nature of the noise is usual or unusual.

(3) Whether the origin of the noise is associated with nature or human-made activity.

(4) The intensity of the background noise, if any.

(5) The proximity of the noise to sleeping facilities.

(6) The nature and the zoning district of the area within which the noise emanates and of the area within 500 feet of the source of the sound.

(7) The time of the day or night the noise occurs.

(8) The time duration of the noise.

(9) Whether the sound source is temporary.

(10) Whether the noise is continuous or impulsive.

(11) The volume of the noise.

(12) The existence of complaints concerning the noise from persons living or working in different places or premises who are affected by the noise.

The parties have stipulated that the city construes and enforces these two provisions of the

noise ordinance as prohibiting all noise that can be heard 25 feet away.

Katra's testimony

For purposes of this case, Thomas S. Katra qualifies as an expert in the area of noise and noise measurements. Katra testified that he visited Ithaca Commons for the purpose of measuring and judging the impact of the 25-foot noise restriction on Ithaca Commons in the area where plaintiff had been preaching. Using an "integrating sound level meter," Katra made sound level measurements at the same time of day on the same day of the week as the incident in issue, although in February instead of October.

Katra described his methods and concluded that 56 decibels was the maximum noise level at which a person could speak and still be in compliance with the ordinance 50 percent of the time. He stated that this decibel level is lower than that generated by the clicking of high-heeled boots, conversations between two or three people, a shop door opening and closing, a small child playing on a playground and a cellular telephone. He further stated that "most normal human activity would be clearly audible at a distance of 25 feet." When asked if plaintiff's "mode of communication, that being preaching, [can] comply with the 25-foot restriction," he replied: "Not at the environment that existed ... the day I was there, which I assume was typical." He added that "you could not hold a spirited conversation between two people and not violate that restriction." He also stated that the restriction is "incompatible" with Ithaca Commons.

On cross-examination, Katra stated that he did not know how many people had been in "close proximity" (six to eight feet) of plaintiff while plaintiff was preaching and that he had not measured the decibel level of plaintiff's preaching. He agreed that the duration of a loud

sound is an important factor in whether it is annoying or alarming and that factors such as annoyance and alarm cannot be scientifically measured.

The Court adopts Katra's factual findings but not his opinions. Therefore, the Court finds that Katra made his measurements in February at the same place and time of day as the October 9, 1999 incident in issue; that 56 decibels was the maximum noise level at which a person could speak and still be in compliance with the ordinance 50 percent of the time; that this decibel level is lower than that generated by the clicking of high-heeled boots, conversations between two or three people, a shop door opening and closing, a small child playing on a playground and a cellular telephone; that most normal human activity would be clearly audible at a distance of 25 feet; and that a spirited conversation between two people would be clearly audible at a distance of 25 feet. The Court further finds that there is no evidence regarding how many people were in "close proximity" (six to eight feet) of plaintiff while he was preaching; that Katra did not measure the decibel level of plaintiff's preaching; that the duration of a loud sound is an important factor in whether it is annoying or alarming; and that factors such as annoyance and alarm cannot be scientifically measured.

The Court rejects as irrelevant Katra's opinion that under the conditions at Ithaca Commons plaintiff's "mode of communication, that being preaching, [cannot] comply with the 25-foot restriction." This opinion begs the question, because it is apparently based on the stipulated definition of "preaching" as "speech that can be heard beyond twenty-five feet." In other words, plaintiff defines "preaching" as speech which is heard beyond 25 feet and then states the obvious conclusion that "preaching" cannot comply with the 25-foot restriction. However, proof that plaintiff cannot "preach" is not proof that he cannot reasonably make his

message heard. There is no evidence that in order for plaintiff to communicate his religious message in a reasonable manner to a reasonable number of people, his speech must be heard at a distance of 25 feet or more.

The Court also rejects Katra's opinion that the ordinance is "incompatible" with Ithaca Commons. Katra does not explain the basis for this opinion, nor does he explain the meaning he ascribes to the word "incompatible." In any event, "compatibility" is not in issue here.

DISCUSSION

Noise regulation – generally

Public fora such as streets and parks "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983) (citation and internal quotation marks omitted). Even in a public forum, however, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that (1) the restrictions are content-neutral, that is, they are justified without reference to the content of the regulated speech; (2) they are narrowly tailored to serve a significant governmental interest; and (3) they leave open ample alternative channels for communication of the information. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Content-neutrality

A speech regulation is content-neutral if it is "justified without reference to the content of the regulated speech," that is, if it "serves purposes unrelated to the content of expression, ... even if it has an incidental effect on some speakers or messages but not others." *Id.* The

City's noise ordinance is not explicitly content-based. Moreover, it serves a legitimate governmental purpose unrelated to the content of expression, that is, protecting people in the City from excessive noise. *See generally Ward*, 491 U.S. at 792.

A regulation which is not overtly content-based, however, may nevertheless be invalid if it "places unbridled discretion in the hands of city officials charged with enforcing it[,]" *id*. at 793, thus permitting arbitrary – and potentially content-based – enforcement. *See Turley v. Police Dep't of the City of New York*, 167 F.3d 757, 761-62 (2d Cir. 2000). In addressing such a claim, courts examine (1) the text of the ordinance, (2) any binding judicial or administrative construction of it (there is none here), and (3) the municipality's established practice in interpreting it, that is, whether the municipality has interpreted the ordinance in such a manner as to provide additional guidance to the officials charged with its enforcement. *See Ward*, 491 U.S. at 795-96; *Turley*, 167 F.3d at 762.

Plaintiff contended on previous motions that the ordinance improperly permits arbitrary, content-based enforcement. The parties have now stipulated that the city construes and enforces the noise ordinance, specifically sections 240-4 and 157-18, as prohibiting any noise that can be heard 25 feet away. The 25-foot restriction does not permit arbitrary, content-based enforcement. Therefore, in view of the text of the ordinance and municipality's established practice in interpreting it, plaintiff has not demonstrated that the ordinance is not content-neutral.

Narrow tailoring

A regulation of the time, place, or manner of protected speech "must be narrowly tailored to serve the government's legitimate, content-neutral interests but ... it need not be the

least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798. The requirement of narrow tailoring is satisfied so long as the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* at 799 (citation and quotation marks omitted). The government may not, however, regulate expression "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.*

There is no doubt that, even in a traditional public forum such as Ithaca Commons, the City has "a substantial interest in protecting its citizens from unwelcome noise." *Id.* at 796 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)). The issue, then, is whether the noise ordinance "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799.

In support of his contention that the noise ordinance burdens substantially more speech than is necessary to advance the City's interest in preventing excessive noise in Ithaca Commons, plaintiff asserted that the 25-foot restriction prevented his message from being heard and understood by passersby. He further averred that the ordinance was so restrictive that "normal human activities" typical to Ithaca Commons constitute violations.

The record does not support a finding that the noise restriction places a significant burden on protected speech. There is no showing that compliant speech can not be heard and understood by a reasonable number of people. Plaintiff presents no evidence that in order for passersby to hear and understand his religious message, his speech must be heard at a distance of 25 feet or more; indeed, inasmuch as the streets in Ithaca Commons are 66 feet wide, it would seem that compliant speech would be heard by a significant proportion of people in the

area. Certainly plaintiff is not entitled to have his speech heard by everyone.

Nor does the record support a finding that the City's goal of avoiding excessive noise could be met by a less burdensome restriction. Plaintiff relies on proof that normal human activity in the area such as a door closing or a "spirited" conversation exceed the 25-foot limit. This proof, however, does not mean that the 25-foot restriction is overbroad. The fact that occasional, intermittent or impulsive sounds occasionally exceed the restriction is not evidence that the restriction is overly burdensome. Nor is it evidence that continuous and persistent preaching at the same volume as such occasional sounds would not be excessive noise.

Plaintiff has failed to show that the ordinance burdens substantially more speech than is necessary to further the city's legitimate interest in prohibiting excessive noise. Thus, he has not shown that the ordinance is not narrowly tailored to serve the City's legitimate, content-neutral interests.

Alternative channels for communication

Plaintiff also argued that the ordinance effectively prohibits him from preaching and fails to leave open ample alternative avenues of communication. This argument is based on the assumption that the ordinance prevents him from preaching in a voice loud enough to make his message heard, an assumption not established on this record. Stated differently, plaintiff has not shown that he could not communicate his message in a manner which would be in compliance with the ordinance, for example, by speaking at a lower volume.

Selective enforcement

Finally, plaintiff argued that the noise ordinance was so restrictive that everyday

activities typical to Ithaca Commons constitute violations and that therefore it is necessarily selectively enforced. To make out an equal protection claim, plaintiff must show that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

The parties stipulated that at the time in question, plaintiff observed others in the area who could be heard 25 feet away, including people talking from beyond 25 feet away and a singing group of about ten women about 200 feet away, and that everyone other than plaintiff and his companions was left undisturbed. These facts, without more, are insufficient to meet plaintiff's burden of showing that he was similarly situated to the singers or the others. For example, the singers may have had a permit, or the sounds of conversation may have been transient as groups walked through Ithaca Commons. Likewise, plaintiff has not shown that there is no rational basis for the difference in treatment. Plaintiff has not established a claim of selective enforcement.

CONCLUSION

Upon review of the record submitted to the Court for determination of this action, the Court holds that plaintiff has not carried his burden of demonstrating that he is entitled to relief on any theory. He has not established that the ordinance violates the First Amendment requirements of content-neutrality, narrow tailoring, or alternative channels of communication. Nor has he shown that the ordinance was selectively enforced against him in violation of the Equal Protection clause. There is no other basis for relief on this record. Accordingly, it is

ORDERED that the action is dismissed in its entirety with prejudice.

IT IS SO ORDERED.

August 10, 2004
Syracuse, New York

Norman A. Mordue
U.S. District Judge